The Illusion Vanishes

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Draft Version 1.0—May 8, 2001

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I wish to thank the contributors to the DVD Discussion List for suggesting many of the ideas and references used in this article and I especially want to thank Judith Kaul, of the CWRU Law Library for her invaluable assistance.

The original version of this article was written on a Linux system using the EMACS and vi editors. It was typeset in PDF format using the PDFLaTeX program with the hyperref package.

1 Overview

Back in September, 1999, Jon Johansen, a fifteen-year old Norwegian student, wrote a little computer program that he named "DeCSS."[1]

On January 14, 2000, all the major motion picture studios[2] filed a civil suit in the Federal District Court for the Southern District of New York against three individuals[3] who had published Johansen's program on their World Wide Web sites, accusing them of having violated 17 U.S.C. § 1201(a)(2), one of the so-called "Anti-Circumvention" provisions of the Digital Millenium Copyright Act (hereinafter the "DMCA"), by being "responsible for proliferating a software device that unlawfully defeats the DVD copy protection and access control system—the Contents Scramble System ("CSS")."[4]

This case immediately became a *cause célèbre* in civil liberties circles—and especially among the relatively small band of civil libertarians who are concerned with the civil liberties of computer programmers—for the suit

[1]⇑ Links to the DeCSS code may be found at <URL: http://www.csdco.com/ cgadd/dvd.htm>.

More information about how Jon Johansen came to write the DeCSS program is set out *infra* in the text accompanying Note 29.

[2]⇑ Universal City Studios, Inc., Paramount Pictures Corp., Metro-Goldwyn-Mayer Studios Inc., Tristar Pictures, Inc., Columbia Pictures Industries, Inc., Time Warner Entertainment Co., L.P., Disney Enterprises, Inc., and Twentieth Century Fox Film Corp. These studios are all members of the Motion Picture Association of America ("MPAA").

[3]⇑ Shawn C. Reimerdes, Eric Corley a/k/a "Emmanuel Goldstein", and Roman Kazan.

The defendants Reimerdes and Kazan subsequently agreed to remove the DeCSS programs from their web sites and were dismissed from the action.

This suit is hereinafter referred to as the *Reimerdes* case.

[4]⇑ Complaint, Universal City Studios, Inc. v. Reimerdes, paragraph 1, <URL: http://samsara.law.cwru.edu/dmca/dvd-sdny-complaint.html>.

appeared to constitute a basic attack on the defendants' First Amendment right to publish the text of computer programs; certainly if the plaintiffs were to prevail it could only be on the grounds that the writings of computer programmers are not entitled to the full protection of the freedoms of speech and of the press that are guaranteed by the First Amendment to the United States Constitution. So the Electronic Frontier Foundation, with considerable fanfare, volunteered to defend the defendants and the First Amendment.[5]

The case was heard by Judge Lewis A. Kaplan in the federal district court for the Southern District of New York, who conducted the proceedings with remarkable expedition.[6]

This unusual rush to judgment undoubtedly contributed to the remarkable illusion, which almost everyone seems still to suffer from, that the *Reimerdes* case is necessarily about the exciting issues of free speech and the First Amendment,[7] rather than the much less interesting issue of whether the prohibitions of 17 U.S.C. § 1201(a)(2)[8] actually apply to a computer program or device like DeCSS that is intended to descramble the scrambled contents of DVD's and other similar tangible media of expression.[9]

This article seeks to explain how that illusion arose and, more impor-

[5]⇑ EFF Press Release: Film Industry Escalates Legal Attacks on Technical Community, Jan. 15, 2000.

[6]⇑ The complaint was filed on Friday January 14, 2000. *See supra* Note 4. The complaint was accompanied by an Order to Show Cause returnable on Thursday January 20, 2000, in which the plaintiff's sought, not a temporary restraining order, but a preliminary injunction forbidding the defendants from "posting on any Internet website, or in any other way manufacturing, importing, offering to the public, providing, or otherwise trafficking in DeCSS."Universal Studios v. Reimerdes, Order to Show Cause, Jan 14, 2000. On January 20, after a three hour hearing at which the defendants were represented by counsel in California speaking over a speaker phone who had not had an opportunity to read the plaintiffs' memoranda of law nor had time to prepare and present any evidence, Judge Kaplan granted the plaintiffs' motion from the bench.

At the conclusion of the hearing Judge Kaplan said: "I will act promptly on any application by the plaintiffs to set this case for a trial just as fast as I can reach it. And all you have to do is communicate with my chambers and you'll be on the fastest express train you ever saw because I take this seriously. And you will get as prompt a trial as I can give you, and I think that's very prompt. Universal Studios v. Reimerdes, Transcript of Hearing, Jan. 20, 2000.

A trial on the issue of whether to grant a permanent injunction was held on July 17-25, 2000 and Judge Kaplan granted the permanent injunction on August, 17. EFF MPAA DVD Cases Archive. Since the entire proceeding considered only the plaintiffs' motion for an injunction, the defendants never had occasion to write and file an answer.

[7]⇑ And related issues such as "fair use" under the copyright laws.

[8]⇑ *See infra* Section 2.2.

[9]⇑ *See infra* Section 5.6.

tantly, to dispel it by demonstrating that under any reasonable interpretation of 17 U.S.C. § 1201(a)(2) it is not a violation of that section to be "responsible for proliferating a software device"[10] that "defeats the DVD copy protection and access control system."

The fact that, in the rush to judgment, the defendants' counsel never had the opportunity to prepare and file an answer undoubtedly contributed to the defendants' failure to explicitly raise the defense that the complaint in *Reimerdes* failed to state a claim for which relief can be granted.[11] The major contributor to the illusion that the complaint did allege a violation of 17 U.S.C. § 1201(a)(2) was undoubtedly the sheer importance of the constitutional issues that were raised by the plaintiffs' seeking—and Judge Kaplan's granting—an injunction requiring the defendants to remove the text of a computer program from their World Wide Web sites and also to remove any links pointing to that program published on the Web sites of others.[12]

[10]⇑ That there is something odd about the plaintiffs' complaint is surely reflected by the peculiar terminology in which it is phrased: "proliferation" and the oxymoronical phrase "software device" are not terms that appear in the statute.

[11]⇑ It was only reasonable to assume after the initial hearing in front of Judge Kaplan that he would not have looked with much sympathy upon a motion to dismiss the complaint on those grounds.

[12]⇑ Those issues are also dear to my heart, since I was the plaintiff in Junger v. Daley, 209 F.3d 481 (6th Cir. 2000), the primary authority up to now for the proposition that computer programs are indeed protected by the First Amendment.

I would much rather be writing about the application of the First Amendment to the publication of computer programs than about the application of the Anti-Circumvention Provisions of the DMCA to Digital Versatile Disks. I think it is important, though, to recognize that Congress did not intend, in passing the Anti-Circumvention provisions, to impair the freedoms of speech and of the press, and that the those provisions were actually carefully drafted to avoid such a result. I also believe that the First Amendment issues should not be resolved in a case where it is not necessary to reach them.

I must admit that I, too, did not at first notice that it is not a violation of the Anti-Circumvention provisions of the DMCA for one to circumvent, or create devices or technology to intended to circumvent, access controls that are intended to prevent one from gaining access to a tangible copy of a copyrighted work, like a video DVD or an electronic book, so completely was I under the illusion that the *Reimerdes* case was only about important First Amendment issues.

I only overcame the illusion as I was submitting my reply comment to the Copyright Office of the Library of Congress in response to that Office's request for comments on exemptions to the access control provisions of 17 U.S.C. § 1201(a)(1), the section that actually forbids circumvention. 64 Fed. Reg. 66139 (Nov. 24, 1999).

In my original comment [Comments On Circumvention of Technological Measures That Limit Access to Uncopyrighted Materials in Copyrighted Works, dated February 17, 2000] I argued:

> Considering the constitutional mandates declared by the Supreme Court in *Feist* [*Feist Publications, Inc.* v. *Rural Telephone Service Co.*, 499 U.S. 340

Even as the defendants' appeal from Judge Kaplan's decision in *Reimerdes* was about to be heard by the federal Court of Appeals for the Second Circuit on May 1, 2001, all attention was still fixed on the important constitutional issues that seemed to be raised by that case. Thus, at that time, one newspaper account reported: "Whatever the Second Circuit decides, legal experts say it's likely the case will be heard eventually in the United States Supreme Court."[13] But the case will almost certainly not go to the Supreme Court if the Second Circuit rules, as I believe it must, that it is not a violation of 17 U.S.C. § 1201(a)(2) to make and traffic in a technology or device that can be used to circumvent the access controls that scramble the contents of a video DVD because it is not a violation of 17 U.S.C. § 1201(a)(1) to circumvent those access controls.[14]

> (1991)], it seems clear that works protected by copyright pursuant to Title 17 of the United States Code, but that contain matter that is not protected by that copyright, should be one of the classes of works whose users are not subject to the anti-circumvention provisions of 17 U.S.C. § 1201(a)(1)(A).

Id. at p.8. And I then argued that two subclasses of that class in particular should be exempted: (i) collections of legal materials and (ii) computer programs.

I was not able at that time, however, to come to a sensible interpretation of the other provisions of § 1201(a), especially those that seemed to say that the owner of a copy of a work could not get access to the content of that copy, without "authority" from the copyright owner, if the work were subject to some form of scrambling or encryption or some other technical measure. It was only when I was writing a reply comment, Reply Comments On Prohibiting Circumvention of Technological Measures that Limit Access to Copyrighted Works, dated March31, 2000, that it struck me that a careful reading of the language of the Copyright Act makes it clear that the prohibition of § 1201(a)(1)—and also the prohibition of § 1201(a)(2)—does not apply to the owner of a copy, be it book, CD, or DVD, in which the work is fixed. Such a person, having access to the copy that he purchased, needs no additional authority from the copyright owner to read, or listen to, or view the work fixed in the copy. *Id.* at 2-4. In that reply comment I first sketched out the arguments that I am making in this article.

[13]⇑ Carl S. Kaplan. *Does an Anti-Piracy Plan Quash the First Amendment?*, New York Times, April 27, 2001, Cyber Law Journal.

> "This case poses the most important constitutional issues of the first part of the 21st Century," said Eben Moglen, a law professor at Columbia Law School and one of the co-authors of a friend-of-the-court brief supporting . . . [the defendants]. "The case points up the intrinsic First Amendment conflict with the new law of copyright," he said.

Id.

[14]⇑ It is still true that the case is likely to go to the Supreme Court if the Second Circuit's opinion either accepts or rejects the defendant's constitutional arguments. On the other hand, I am willing to stick out my neck and predict that if the case does get to the Supreme Court that Court will remand the case with instructions to dismiss the complaint for failure to state a claim for which relief can be granted.

What everyone has pretty much overlooked[15] in the heat of battle is

[15]⇑ The defendants do raise the issue of whether the use of DeCSS is a violation of 17 U.S.C. § 1201(a)(1) in Section VI of their initial brief to the Second Circuit on Appeal, where they argue that Section 1201 is susceptible to a constitutional interpretation:

> **B. Since DeCSS Is Used By Those Who Have Purchased DVDs, It Is Outside the Scope of Sect. 1201.**
>
> In addition, the definition of a technology that allows illegal "circumvention" under § 1201 also places DeCSS outside its scope. For a technology to be illegal under any subsection of § 1201(a)(2), it must "circumvent a technological measure that controls access to a [copyrighted] work" under the statute. § 1201(a)(3)(A) defines "circumvention device" as one that allows access to a copyrighted work "*without the authority* of the copyright owner" (emphasis added).
>
> A consumer who buys a copy of *The Matrix* on DVD has "authority" to access it in order to view it. If not, it is unclear what she paid approximately $25 for. Congress specifically confirmed this point with reference to circumvention necessary to fair use:
>
> > . . . where access is *authorized*, the traditional defenses to copyright infringement, including fair use, would be fully applicable. So, an individual would not be able to circumvent in order to gain unauthorized access to a work, but would be able to do so in order to make fair use of a work which he or she has lawfully acquired.
>
> H.R Rep. 105-551, pt. 1 (1998)(*emphasis added*). § 1201 was therefore intended to reach technologies that allow *unauthorized persons* to access copyrighted works, not to prevent fair use or noninfringing use of lawfully owned DVDs.
>
> DeCSS allows persons who have purchased or lawfully obtained DVDs to view them. In an example much discussed at trial, DeCSS allows lawful owners to view their DVDs on computer platforms such as the Linux platform, for which no player has yet been released. If an individual is legally authorized to view and decrypt the DVD upon purchase, this "authority" is not revoked simply because she uses a different computer operating system than that anticipated by the Studios.
>
> Ignoring this straightforward interpretation, the District Court held that the "authority" required in 1201 is equivalent to the "consent" of the copyright owners. It decided that because the plaintiffs intended or expected that owners of DVD movies would only view the movies on licensed players, such lawful owners lack "authority" to view DVD movies on other devices and so devices that allow such viewing are illegal. Inherent is this reasoning is the improper assumption that buying a copy of *The Matrix* on DVD entails no right or privilege to view it or that this right is somehow limited to viewing on those players approved by the copyright owners. Yet if the "authority" to view a work does not pass to the consumer upon purchase, when does it pass? And if it is limited in some way, by what mechanism is it limited? The District Court failed to even raise these questions, much less answer them.
>
> The correct construction of § 1201(a)(3)(A) is that it simply does not reach

that, although the plaintiffs could only win by persuading the courts that the defendants' publication of the DeCSS program was not protected by the First Amendment, the defendants had a much stronger defense: the fact that under any reasonable interpretation of 17 U.S.C. §§ 1201(a)(1) and (2) neither of those sections apply to the "DVD copy protection and access control system" and therefore that the publication of the DeCSS program could not violate those sections even though the DeCSS program can be used to circumvent the CSS system.

The impression that the *Reimerdes* case will be resolved in terms of the First Amendment is thus an illusion. At least that is my contention in this article. The publication of the DeCSS program clearly is not a violation of the Anti-Circumvention provisions of the DMCA and thus *Reimerdes* should not be treated or decided as a First-Amendment case.[16]

Perhaps the strongest argument that can be raised against this contention is the fact that everyone else seems to assume that 17 U.S.C. § 1201(a)(2)—which arguably prohibits the publication of a computer program that is intended to be used to gain access to a copyrighted work that has been scrambled by a technological measure like the Content Scrambling System—applies to tangible copies of a work such as a video Digital Versatile Disk. I am thus in this article also going to have to explain how this illusion arouse and why it is indeed a illusion. The key points are that, as defined in the Copyright Act, a "work" is something very different from a "copy" and that by selling copies of their works in the form of DVD's, the

> technologies like DeCSS that allow access to a work by those who legitimately possess a copy of it or who have a legitimate right to access the work under fair use or free speech principles. These persons are accessing the work with the "authority" of copyright law and the technologies that allow them to do are outside the reach of § 1201.

Universal City Studios v. Reimerdes, Appellants Appeal Brief Section VI(B) (Jan. 19, 2001). [Footnotes deleted; citations omitted]

Although this issue was clearly raised by the defendants in their appeal brief, it was apparently never mentioned at oral argument.

The major difference, if it is a difference, between what the defendants argued in their brief and what I am arguing here is that the defendants seem only to be claiming their interpretation is *a possible way* of avoiding the constitutional issues, while I am arguing that that interpretation—which is also mine—is *the correct interpretation* of 17 U.S.C. § 1201 and that therefore one need never get to the constitutional issues.

[16]⇑ This is not to suggest that the defendants were wrong to raise the First Amendment issues as defenses. There is, after all, always the possibility that I may be wrong in my contention. Furthermore, one of the stronger arguments for interpreting sections 1201(a)(1) and (2) as not applying to video DVD's and their CSS system is that it avoids the necessity of deciding the constitutional issues that otherwise would have to be considered. *See infra* Section 6.

plaintiffs have granted the purchasers the authority to descramble them.

2 The Anti-Circumvention Provisions

Sections 1201(a)(1) and 1201(a)(2) of Title 17 of the United States Code comprise two of the three provisions[17] that are often called the "Anti-Circumvention" provisions of the Digital Millenium Copyright Act ("DMCA").[18]

2.1 17 U.S.C. § 1201(a)(1)

Title 17 U.S.C. § 1201(a)(1) provides that *no person shall descramble a scrambled work protected under the Copyright Act, decrypt an encrypted work protected under the Copyright Act, or otherwise avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner, that in the ordinary course of its operation, requires the application of information, or a process or treatment with the authority of the copyright owner, to gain access to such a work.*[19]

Put more simply, the first of the Anti-Circumvention provisions forbids the act of gaining access[20] to a technologically protected "work" without

[17]⇑ The third is 17 U.S.C. § 1201(b), which need not concern us here.

[18]⇑ Pub. L. No. 105-304, 112 Stat. 2860, 2887 enacted October 28, 1998.

[19]⇑ This rendition attempts to replace the defined terms used in § 1201(a)(1)(A) with their definitions.

§ 1201(a)(1)(A) provides that:

> No person shall circumvent a technological measure that effectively controls access to a work protected under this title. . . .

while § 1201(a)(3) provides that:

> As used in this subsection—
>
> > (A) to "circumvent a technological measure" means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner; and
> >
> > (B) a technological measure "effectively controls access to a work" if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.

[20]⇑ This new right that the owner of a copyright has to keep others from gaining access to the copyrighted work is sometimes called an "access right" to distinguish it from the copyright itself, which consists only of the exclusive rights conferred on a copyright owner by the provisions of 17 U.S.C. § 106. *See infra* 88.

the "authority of the copyright owner."

That provision, however, is not the basis for the motion picture industry's claims in the *Reimerdes* case; in fact, the prohibition of that section was not even in force at the time that the complaint was filed in *Reimerdes*.[21] The defendants there were not accused of circumventing a technological measure that prevented them from getting access to a copy of a movie stored on a Digital Versatile Disk ("DVD"); if they had been, someone probably would have noticed that such conduct was not forbidden by § 1201(a)(1) since (i) that section refers to obtaining access to a "work," not to a "copy" of a work to which the owner already has access, and (ii) the purchaser of a DVD or other copy of a work obviously already has the copyright owner's authority to access it.

The claim was rather that the defendants had violated 17 U.S.C. § 1201(a)(2) by posting on their web sites a copy of the DeCSS program that unscrambles the CSS[22] copy protection system on video DVD disks and permits one to access their contents without, or so it was alleged, the authority of the copyright owner.[23]

2.2 17 U.S.C. § 1201(a)(2)

Title 17 U.S.C. § 1201(a)(2) basically provides that *no person shall manufacture, import, offer to the public, provide, or otherwise traffic in*[24] *any technology, product, service, device, component, or part thereof, that is primarily designed or produced for the purpose of circumventing a technological measure in violation of § 1201(a)(1), that has only limited commercially significant purpose or use other than to circumvent a technological measure in violation of § 1201(a)(1), or is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumvent-*

[21]⇑ The second sentence of § 1201(a)(1)(A) reads as follows: "The prohibition contained in the preceding sentence shall take effect at the end of the 2-year period beginning on the date of the enactment of this chapter," *i.e.*, not until Oct. 28, 2000. *See supra* Note 18.

[22]⇑ *See* CSS Source Code, <URL: http://samsara.law.cwru.edu/dmca/csscode.html>.

[23]⇑ Of course, if the person seeking access had purchased the disk from the copyright owner, it is difficult to understand how any access by the purchaser without the authority of the copyright owner. *See infra* Section 5.3.

[24]⇑ The draftsmen of this section appear to have been careful not to refer to "publishing software," but software is probably included in the broader term technology while offering to the public probably includes software.

Although it is my conviction that legislative provisions forbidding the publication of software will almost always violate the First Amendment, I do not believe that that issue need be raised in the context of the *Reimerdes* case.

ing a technological measure in violation of § 1201(a)(1).[25]

More simply, this section forbids the manufacture and trafficking in any technology, product, service, device, component, or part thereof that is intended to be used in violation of 17 U.S.C. § 1201(a)(1).

2.3 If the Use of a Technology or Device Does Not Violate § 1201(a)(1), Its Distribution Does Not Violate § 1201(a)(2)

The key point here is that trafficking in Anti-Circumvention technologies is forbidden by 17 U.S.C. § 1201(a)(2) only if the use of those technologies is forbidden by 17 U.S.C. § 1201(a)(1); if the use of a technology is not a violation of § 1201(a)(1) then creating or trafficking in that technology is not a violation of § 1201(a)(2).

The defendants in the *Reimerdes* case were charged under § 1201(a)(2) with publishing software on their web sites that was intended to be used in violation of § 1201(a)(1) by allowing the users to circumvent the scrambling system that prevents one from gaining access to the contents of a DVD. It is my contention in this article that circumventing a scrambling system that prevents one from gaining access to the contents of a DVD is not a violation of § 1201(a)(1) and that consequently it is not a violation of § 1201(a)(2) to publish a program that is intended to assist one in gaining access to the contents of a DVD.

It is the assumption that descrambling the CSS system that makes it difficult to gain access to the contents of a video DVD amounts to a violation

[25]⇑ 17 U.S.C. § 1201(a)(2) provides in its entirety:

> No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that—
>
> > (A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title;
> >
> > (B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title; or
> >
> > (C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing a technological measure that effectively controls access to a work protected under [the Copyright Act].

The definitions of "circumvent a technological measure" and "effectively controls access to a work" are set out *supra* in Note 19.

of § 1201(a)(1)[26] that leads to the conclusion that the distribution of the DeCSS program is a violation of § 1201(a)(2), the conclusion that I claim here is an illusion.

To demonstrate that the distribution of the DeCSS program does not violate § 1201(a)(2), it thus becomes necessary to focus our attention on § 1201(a)(1). In the *Reimerdes* case, however hardly any attention was given to the latter section. That is how the illusion grew that the complaint in *Reimerdes* did state a good cause of action and that the defendants only defense is to raise the First Amendment issues.

3 DVD's and DeCSS

To understand whether the use of the DeCSS program to gain access to the contents of a DVD violates 17 U.S.C. § 1201(a)(1) requires some understanding of DVD's and DeCSS.

3.1 DVD's

The members of the MPAA sell copies of their movies recorded on so-called video Digital Versatile Disks, or DVD's.[27] The contents of these video DVDs

[26]⇑ Judge Kaplan did hold that "CSS effectively controls access to plaintiffs' copyrighted works" and then concluded that

> By the admission of both Jon Johansen, the programmer who principally wrote DeCSS, and defendant Corley, DeCSS was created solely for the purpose of decrypting CSS–that is all it does. Hence, absent satisfaction of a statutory exception, defendants clearly violated Section 1201(a)(2)(A) by posting DeCSS to their web site.

Universal City Studios v. Reimerdes, 111 F. Supp. 2d 294, 318-319.

Judge Kaplan in reaching this conclusion conflated access to a work with access to a copy of a work and rejected the claim that the purchaser of a copy of a work has the copyright owner's authority to access it. In later arguments, however, those two issues were pretty much ignored.

[27]⇑

> DVD, which once stood for digital video disc or digital versatile disc, is the next generation of optical disc storage technology. It's essentially a bigger, faster CD that can hold cinema-like video, better-than-CD audio, and computer data. DVD aims to encompass home entertainment, computers, and business information with a single digital format, eventually replacing audio CD, videotape, laserdisc, CD-ROM, and video game cartridges. DVD has widespread support from all major electronics companies, all major computer hardware companies, and all major movie and music studios. With this unprecedented support, DVD has become the most successful consumer electronics product of all time in less than three years of its introduction.

are all scrambled or encrypted using the so-called Content Scrambling System or CSS; they can also be unscrambled or decrypted by the CSS software.[28] To view a video DVD one must have access to a stand-alone DVD viewer or to a general purpose computer running the descrambling portion of the CSS software or some equivalent program. At the time the complaint was filed in the *Reimerdes* case the only general purpose computers that supported CSS software were those that used the Microsoft Windows operating system.

3.2 DeCSS

> In late September 1999, Jon Johansen, a Norwegian subject then fifteen years of age, and two individuals he "met" under pseudonyms over the Internet, reverse engineered a licensed DVD player and discovered the CSS encryption algorithm and keys. They used this information to create DeCSS, a program capable of decrypting or "ripping" encrypted DVDs, thereby allowing playback on non-compliant computers as well as the copying of decrypted files to computer hard drives. Mr. Johansen then posted the executable code on his personal Internet web site and informed members of an Internet mailing list that he had done so. Neither Mr. Johansen nor his collaborators obtained a license from the DVD CCA.
>
> Although Mr. Johansen testified at trial that he created DeCSS in order to make a DVD player that would operate on a computer running the Linux operating system, DeCSS is a Windows executable file; that is, it can be executed only on computers running the Windows operating system. Mr. Johansen explained the fact that he created a Windows rather than a Linux program by asserting that Linux, at the time he created DeCSS, did not support the file system used on DVDs. Hence, it was necessary,

"DVD Frequently Asked Questions (and Answers)", <URL: http://dvddemystified.com/dvdfaq.html#1.1> (Feb. 10, 2001 revision).

[28]⇑ What apparently is source code for the portion of the CSS software that does the unscrambling can be found at < URL: http://samsara.law.cwru.edu/dmca/csscode.html>. A copy of this code was filed in the court records of related litigation in the California Superior Court for Santa Clara County in which the plaintiff DVD Copy Control Association claimed that the DeCSS program unlawfully reveals the Content Control Association's trade secrets. DVD Copy Control Assn, Inc. v. McLaughlin, <URL: http://www.eff.org/IP/Video/DVDCCA_case/>. The copy on the samsara Web server is a copy of the copy that was filed in the court records.

> he said, to decrypt the DVD on a Windows computer in order subsequently to play the decrypted files on a Linux machine. Assuming that to be true, however, the fact remains that Mr. Johansen created DeCSS in the full knowledge that it could be used on computers running Windows rather than Linux. Moreover, he was well aware that the files, once decrypted, could be copied like any other computer files.[29]

4 Dispelling The Illusion; Focusing on § 1201(a)(1)

4.1 Jon Johansen

Although Judge Kaplan in the Federal District Court seems to think that Jon Johansen probably did something wrong, there was no possibility that he could actually have been held liable for violating any of the Anti-Circumvention provisions of the DMCA. In the first place, he was Norwegian and wrote the DeCSS program in Norway. More importantly, the primary Anti-Circumvention provision—17 U.S.C. § 1201(a)(1), the provision that forbids circumventing a technological measure that controls access to a work[30]—did not come into force until October 28, 2000.[31] Most importantly, of course, the Anti-Circumvention provisions of the DMCA simply do not—if my argument in this article is correct—apply to circumvention of access controls contained in video DVD's and other tangible copies of a copyrighted work.

Now, since Johansen could not be sued for violating 17 U.S.C. § 1201(a)(1), no one at the time that the *Reimerdes* case was filed had much reason to look into the question of whether his conduct, if committed within the United States at a later date, would have been a violation of that section. And so all attention was focused on § 1201(a)(2), the section that the defendants in *Reimerdes* were accused of violating.

This undoubtedly contributed to the illusion that the plaintiff's com-

[29]⇑ Universal City Studios v. Reimerdes, Slip Opinion, Aug. 17, 2000, <URL: http://samsara.law.cwru.edu/dmca/2600_decision.pdf> 17-19. [Footnotes omitted]

[30]⇑ *See supra* Section 2.1.

[31]⇑ 17 U.S.C. § 1201(a)(1)(A).

17 U.S.C. § 1201(a)(2)—the provision under which the *Reimerdes* case was brought—was, however, in force since the enactment of the DMCA on Oct. 28, 1998, so it might have been possible to charge Johansen with violation of that section when he first wrote and published DeCSS if he had been in the United States at that time.

plaint in *Reimerdes* did state a good cause of action against the defendants. If Jon Johansen had written the DeCSS program in the United States and if there had not been a moratorium on bringing suit under 17 U.S.C. § 1201(a)(1) at the time that he wrote it, the outcome of the DeCSS litigation would almost certainly have been very different, if only because the the plaintiffs could hardly have avoided suing Johansen.

The actual defendants in the Reimerdes case were undoubtedly carefully selected by the plaintiffs out of the hundreds, or perhaps thousands, of persons who had posted the DeCSS program on their web sites. Here is how Judge Kaplan characterizes Eric Corley, the only remaining defendant in the suit:

> Defendant Eric Corley is viewed as a leader of the computer hacker community and goes by the name Emmanuel Goldstein, after the leader of the underground in George Orwell's classic, 1984. He and his company, defendant 2600 Enterprises, Inc., together publish a magazine called 2600: The Hacker Quarterly, which Corley founded in 1984, and which is something of a bible to the hacker community. The name "2600" was derived from the fact that hackers in the 1960's found that the transmission of a 2600 hertz tone over a long distance trunk connection gained access to "operator mode" and allowed the user to explore aspects of the telephone system that were not otherwise accessible. Mr. Corley chose the name because he regarded it as a "mystical thing," commemorating something that he evidently admired. Not surprisingly, 2600: The Hacker Quarterly has included articles on such topics as how to steal an Internet domain name, access other people's e-mail, intercept cellular phone calls, and break into the computer systems at Costco stores and Federal Express. One issue contains a guide to the federal criminal justice system for readers charged with computer hacking. In addition, defendants operate a web site located at <http://www.2600.com> ("2600.com"), which is managed primarily by Mr. Corley and has been in existence since 1995.[32]

Obviously Mr. Corley is not the type of character who is likely to find favor with most federal judges; he certainly did not find favor with Judge Kaplan.

Jan Johansen, on the other hand, would have made a much more sympathetic defendant[33] despite Judge Kaplan's expressed doubts about his

[32]⇑ Universal City Studios v. Reimerdes, Decision Granting Permanent Injunction pp. 11-13 (Aug. 17, 2000).

[33]⇑ Consider this portion of Johansen's testimony at the *Reimerdes* trial:

conduct.[34] If Johansen had been one of the defendants, the outcome of the case would most likely have been quite different, not only because he was more attractive, but also because the plaintiffs would almost certainly have charged him with a violation of 17 U.S.C. § 1201(a)(1), the primary Anti-Circumvention provision, the one that actually forbids circumvention.

If Jon Johansen were available to serve as a defendant, it is hard to see how the plaintiffs could have avoided suing him—it they were going to sue Eric Corley, as they did—since it was Johansen who wrote the DeCSS program[35] and who first published it on the World Wide Web. And if the plaintiffs were to sue Jon Johansen at any time after the moratorium on bringing suits pursuant to 17 U.S.C. § 1201(a)(1) had expired, it is hard to see how they could avoid suing him under that section as well as under § 1201(a)(2).[36]

Now according to Johansen, he wrote the DeCSS program in order to be able to play his sizable collection of DVD's on his Linux computer, DVD's

> 17 Q. Did any event occur to you personally as a result of your
> 18 writing DeCSS?
>
> . . .
>
> 25 A. Well, in January, on January 25, I had to go to the local
> 1 prosecutor's office because of charges filed by the MPAA in
> 2 Norway, and in February I received an award, a national
> 3 student award which is awarded to students who are in high
> 4 school and have achieved excellent grades and also achieved
> 5 something outside of school in culture, sports, art.
>
> 6 Q. Why did you receive that award?
>
> 7 A. I believe I received the prize because of my part in the
> 8 writing DeCSS.
>
> 9 Q. Did you get a prize?
>
> 10 A. Yes, I did.
>
> 11 Q. Did you get any money?
>
> 12 A. I received about $2,000.
>
> 13 Q. What did you do with the money?
>
> 14 A. I used $1200 and bought a high-end Sony DVD player for my
> 15 TV.

Universal City Studios v. Reimerdes, Transcript, July 20, 2000, at pp. 627-28. (Hereinafter "Transcript.")

[34]⇑ *See supra* text accompanying Note 29.

[35]⇑ With some help from his friends.

[36]⇑ Even if the plaintiffs only sued Johansen under the latter section, Johansen would obviously raise the defense that his actual circumvention of the CSS access controls did not violate the former section and that therefore that writing and publishing the DeCSS software that he used to obtain access to the contents of his DVD did not violate the provisions of the latter section.

that he had purchased for $40 to $50 apiece,[37] rather than being forced to play them only on his computer that ran Microsoft Windows.[38]

It helps one to understand how the illusion that the *Reimerdes* case has nothing to do with Jon Johansen's original writing of the DeCSS program in order to be able to play his DVD's on his Linux machine was created and maintained to note that plaintiff's counsel objected to Johansen's testifying to that matter on the ground that: "[T]he issue in the case has nothing to do with why . . . [Mr. Johansen] created an executable for DeCSS. It has to do with what its function is and what [the defendant] Mr. Corley has done."[39] This is a remarkable basis for an objection to Johansen's testimony as to the reasons why he wrote DeCSS, considering that the defendants' supposed wrong was publishing a computer program that was "primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a [copyrighted] work." In fact, Judge Kaplan was later to say in his opinion:

> By the admission of . . . Jon Johansen, the programmer who principally wrote DeCSS, . . DeCSS was created solely for the purpose of decrypting CSS–that is all it does. Hence, absent satisfaction of a statutory exception, defendants clearly violated Section 1201(a)(2)(A) by posting DeCSS to their web site.[40]

One should note at this point that the portion of the CSS program that is included with dedicated DVD viewers and with the DVD viewer that is available for Microsoft Windows machines also has no other purpose than decrypting files that were encrypted by CSS.

One can understand why the plaintiffs did not want there to be any consideration of why Jon Johansen wrote the DeCSS program, considering

[37]⇑ Transcript at p. 618.

[38]⇑

19 Q. Who wrote DeCSS?

20 A. I and two other people wrote DeCSS.

21 Q. How did this come about?

22 A. In September, October, 1999 I met a person on the Internet 23 and he was also a Linux user. We decided to investigate and 24 find out how we could make a DVD player for Linux.

25 Q. Why did you want to do that?

1 A. Well, at the time I had a dedicated Windows machine, which

2 I used only for DVD playback, and if I could get a Linux

3 player I wouldn't have to have a machine just for DVDs.

Transcript at pp. 619-20.

[39]⇑ Transcript at p. 620.

[40]⇑ Universal City Studios v. Reimerdes, 111 F. Supp. 2d 294, 319.

that he wrote it in order to be able to play his own video DVD's, which he had purchased directly or indirectly from the plaintiffs, on his own computer. It would be exceedingly difficult for the plaintiffs to claim that he did not have their authority to do that.

If the plaintiffs had sued Jon Johansen—or anyone else who used the DeCSS program in order to view his own DVD on his own computer—for circumventing the scrambling done by the Content Scrambling System, they would have been confronted by that embarrassing defense that the circumvention was done with the plaintiff's authority. In response, about all the plaintiffs could have done is to make the claim that, though they had consented to the use of CSS, they had never consented to the use of DeCSS, an argument that they actually made successfully to Judge Kaplan.[41] but never explained how the plaintiffs gave their consent to the use of CSS but denied it to the use of DeCSS.

The trouble with the defendant's position is, of course, that every time one views one's own copy of a DVD, no matter what type of machine or operating system one uses, one has to descramble it. As Jon Johansen testified in response to the question "And how many times did you decrypt DVDs?"

"Well, each time I watch a movie I decrypt a DVD."[42]

In other words, if the plaintiffs' interpretation is correct, Jon Johansen and all the others who own video DVD's violate § 1201(a)(1) each time they view one of those DVD's using either the CSS or DeCSS program.

Now that simply cannot be the case and so it cannot be a violation of 17 U.S.C. § 1201(a)(2) to publish and distribute either CSS or DeCSS.[43]

The plaintiffs, however, were able to maintain the illusion that 17 U.S.C. § 1201(a)(2) proscribes the publication of computer programs like DeCSS by avoiding any serious consideration of 17 U.S.C. § 1201(a)(1) and the defendants, I fear, contributed to the illusion by focusing almost all their attention on the First-Amendment issues that would arise only if 17 U.S.C. § 1201(a)(2) did actually proscribe the publication of DeCSS.

4.2 Alice in Wonderland

That DVD's are not nearly as familiar as books is one of the reasons why the illusion persists that publishing the DeCSS program on a web site would violate 17 U.S.C. § 1201(a) unless there is some sort of First Amendment

[41]⇑ Universal City Studios v. Reimerdes, 111 F. Supp. 2d 294, 317, n. 137.
[42]⇑ Transcript at p. 634.
[43]⇑ This argument is developed further in Section 5 *infra*.

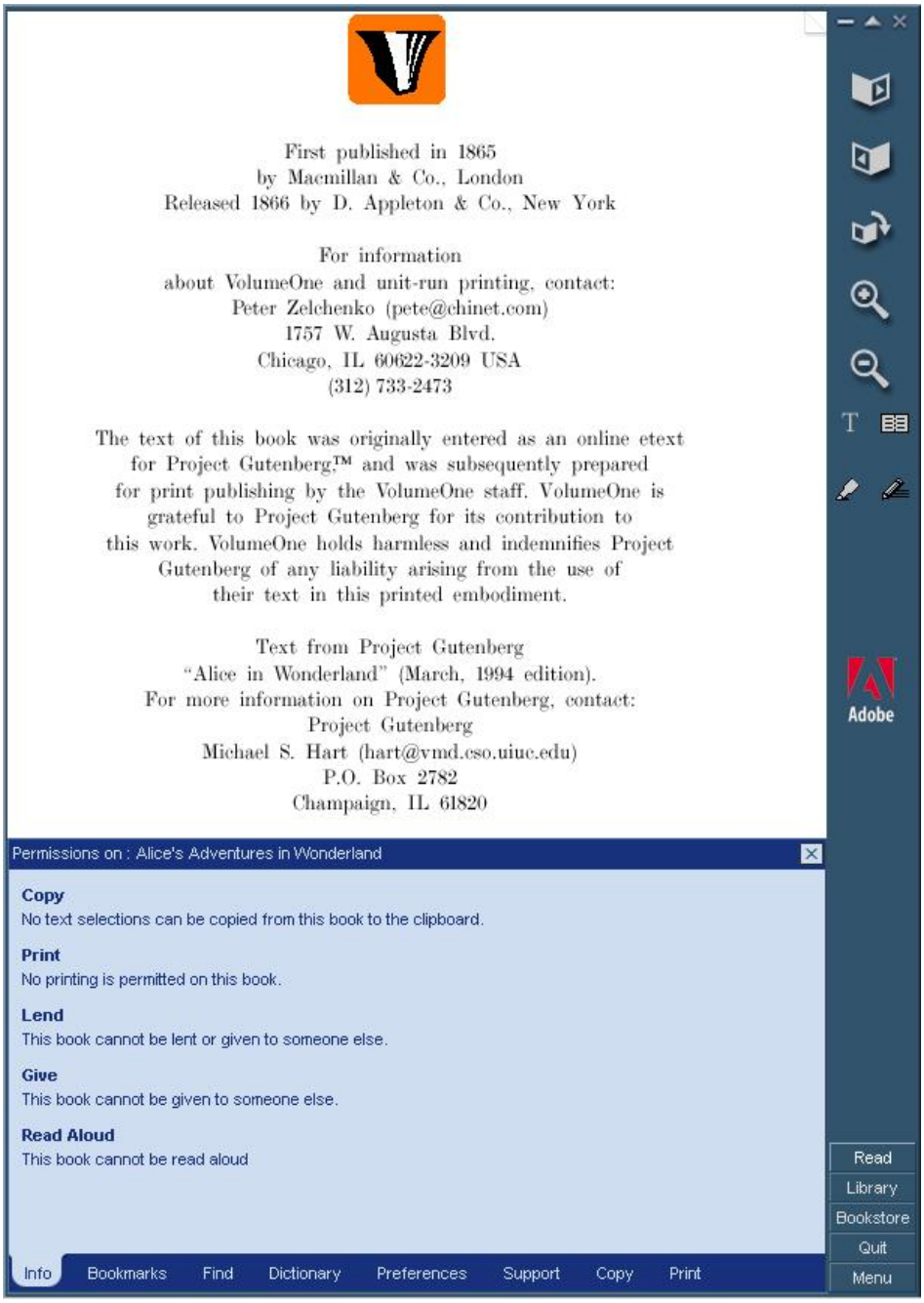

Figure 1: Alice in Wonderland: Title Page & Permissions

defense. To dispel the illusion let us, therefore, examine how the Anti-Circumvention provisions apply to an electronic book. For our example let us take a classic: Lewis Carroll's[44] *Alice's Adventures in Wonderland*, a book that has long been out of copyright, having been first published in England in 1865.[45]

Many editions of *Alice* have been published since then, including several electronic or e-book editions[46] by Project Gutenberg.[47] These Gutenberg e-books, which contain no access controls whatsoever, do not present any problem with respect to the Anti-Circumvention provisions.

The text of one of these Gutenberg editions has, however, been incorporated into another e-book edition of that work[48] prepared by VolumeOne that can only be viewed using the Adobe Acrobat eBook Reader (Formerly GlassBook), an e-book format that does have some form of technological access control.[49]

What is particularly interesting about this particular e-book is the vari-

[44]⇑ You may recall that "Lewis Carroll" is the pen-name of Charles Dodgson, a mathematician and logician of Christ Church College, Oxford. *See* <URL: http://www-groups.dcs.st-and.ac.uk/ history/Mathematicians/Dodgson.html>.

I cannot help but think that, as a logician, Dodgson would have been amused by some of the connundra presented by the Anti-Circumvention provisions of the DMCA.

[45]⇑ University of British Columbia, Special Collections, Alice's Adventures in Wonderland, <URL: http://www.library.ubc.ca/spcoll/alice/>.

[46]⇑ Including: Alice's Adventures in Wonderland, Etext Card ID. –12–, <URL: http://promo.net/cgi-promo/pg/cat.cgi?&label=ID&ftpsite=ftp://ibiblio.org/pub/docs/books/gutenberg/&alpha=12> (ASCII format) and Alice's Adventures in Wonderland, Etext Card ID. –948–, <URL: http://promo.net/cgi-promo/pg/cat.cgi?&label=ID&ftpsite=ftp://ibiblio.org/pub/docs/books/gutenberg/&alpha=948> (html format).

[47]⇑ <URL: http://promo.net/pg/>.

Project Gutenberg is dedicated to supplying e-texts of works that are not subject to copyright, *i.e.*, that are in the "public domain," in "plain vanilla" ASCII format.

ASCII stands for "American Standard Code for Information Interchange" and was originally developed for use with Teletype machines. It encodes the characters of the Roman alphabet and most of the other characters that appear on a standard United States computer keyboard into streams of the digits—the one's and zero's—that are the content of a digital file. ASCII does quite a good job of representing English text, not so good a job, because of accents and umlauts, of representing French and German, and it is, of course, incapable of representing Chinese or Japanese characters. *See ASCII*. The Columbia Encyclopedia (6th ed., 2001), <http://www.bartleby.com/65/as/ASCII.html>.

[48]⇑ With the title shortened to just *Alice in Wonderland*.

[49]⇑ *See* Figure 1 for the title page of this edition, which I downloaded from <http://www.pigdogs.org/art/adobe.jpg>lync. This edition of *Alice* appears to have been disappeared since the title page was first brought to public attention.

ous uses for which it's title page claims access is forbidden, even though the underlying work itself is in the public domain. Those forbidden[50] uses are, at least at first reading, so remarkable that they were quoted without any editorial comment[51] in *Harper's Magazine*:

[Rights]
eVIL

The following restrictions appear in an "eBook" edition of Alice in Wonderland *published by VolumeOne for the Adobe Acrobat eBook Reader.*

Permissions on *Alice in Wonderland*

COPY
No text selection can be copied from this book to the clipboard.

PRINT
No printing is forbidden on this book.

LEND
This book cannot be lent to someone else.

GIVE
This book cannot be given to someone else.

READ ALOUD
This book cannot be read aloud.[52]

That list of permission is also shown in Figure 1.

As one reads this list of permissions, one's first reaction is likely to be: "I don't need their[53] blankety-blank permission to lend someone else

[50]⇑ Or, at least, not-permitted.
[51]⇑ Other than the caption
[Rights]
eVIL
at the top of the article.
[52]⇑ Harper's Magazine, March 2001, page 18.
[53]⇑ Whoever they are.

my book,[54] and I don't need their blankety-blank permission to give it to someone else[55] and I certainly don't need their permission to read my copy of *Alice in Wonderland* to my niece—or to my Dormouse, for that matter." And that certainly would be true enough if the book were an ordinary book of the sort that you can throw at someone's head, or even an ordinary e-book without access controls.

Such a reaction, however, evidences a misunderstanding of what those GlassBook permissions are all about. The list of the permissions that apply to *Alice in Wonderland* does not mean that you *may not* lend or give the book to someone; the way the permissions are set indicates that you *cannot* lend or give the book to someone.[56] The denial of permission to lend or give the book to someone does not mean that you are not authorized to do such things; the denial of permission means that the access controls implemented in the GlassBook software will not let you lend or give away the book as a readable file, unless you can somehow circumvent those access controls.

4.2.1 Obtaining Initial Access to a Work

Before we go on examining the implications of these technological access controls, we should notice that the GlassBook software actually contains two quite different types of access control: the first keeps one from obtaining access to the work—to the text of *Alice in Wonderland*—by "downloading," i.e., making a copy of the work, using the publisher's World Wide Web server; the other—which is the one that we have been discussing up to now and is the only one with which we are really concerned—prevents one from getting access to the contents of a copy of the work that has already been downloaded.

It is worthwhile noting, however, that there are access controls that apply to gaining access to the work itself, rather than to a copy of the work, since the circumvention of this type of access control clearly is a violation of 17 U.S.C. § 1201(a)(1). Adobe, for example, uses some type of technological access control that prevents one from making a copy of the work by downloading the text of any of the works available in GlassBook format, including *Alice*, unless one uses the GlassBook reader program to

[54]⇑ The right of the owner of a book to lend it to someone is, of course, protected by the First Sale doctrine and 17 U.S.C. § 109(a), *supra* Note 97.

[55]⇑ The right of the owner of a book to give it to someone is, of course, protected by the First Sale doctrine and 17 U.S.C. § 109(a), *id.*

[56]⇑ Or, to be more precise, that you cannot lend or give the book to someone in a form in which they can read it using the GlassBook, or any other, software, unless one circumvents the GlassBook access control measures.

download it. If one were to circumvent this access control and download the text in order to make a copy of *Alice in Wonderland*, without the authority of the copyright owner,[57] that would quite clearly be a violation, except, of course, for the fact that no one now owns the copyright to Alice. This type of violation, has, however, no possible application to DVD's which are sold as tangible goods and are not created by downloading their contents from the Internet.

Still, in this context, it is worth mentioning that, if someone were kind enough to make a copy of this edition of *Alice in Wonderland* from Adobe's web site using a GlassBook reader[58] it would not be a violation of the copyright owner's copyright—if there were a copyright owner—for that person to give that copy to me;[59] it certainly could not be a violation of the Anti-Circumvention provisions to give me the copy, for there would have been no new circumvention since the original down-loading. More importantly, I contend that it would not be a violation of the Anti-Circumvention provisions for me to figure out some way to read the copy that was given to me, even though reading it would require me to circumvent the technological controls that keep me from getting access to what is now my copy of *Alice in Wonderland*.[60]

4.2.2 Getting Access to Materials in the Public Domain

Since *Alice* is long out of copyright, it would seem that there is no copyright owner and, more importantly, that, since the work is not protected by copyright, it cannot be a violation of 17 U.S.C. § 1201(a)(1) to circumvent, or to traffic in technology that helps one to circumvent, any technological measure that keeps one from getting access to the unprotected work. Quite clearly the Anti-Circumvention provisions apply only to the circumvention of technological measures preventing one from gaining access to works that are also protected by copyright.[61]

[57]⇑ If one uses the GlassBook software to make the copy that would, of course, also be a circumvention of the access controls, but one that is done with the authority of the copyright owner.

[58]⇑ Which clearly would be done with Adobe's authority, since Adobe does permit such downloading as long as one uses the GlassBook reader.

[59]⇑ Assume that the copy was initially created as a Zip disk or a CDrom that can be given to me without any further copying.

I would need the copy because I cannot make a copy for myself because I use the Linux operating system, a system for which there is no GlassBook reader available.

[60]⇑ *See, infra* Section 5.

[61]⇑ *See supra* Note 19 and accompanying text.

This leads in turn to the conclusion that writing or trafficking in a program intended to circumvent the technological protections that make it difficult to gain access to GlassBook editions of works that are in the public domain is not a violation of 17 U.S.C. § 1201(a)(2). That would, of course, also be true of programs intended to unscramble the Content Scrambling System used on DVD's, if the purpose of the program is to gain access to DVD recordings of films in the public domain, a class of works that may include the original Mickey Mouse films[62] and does include George Romero's, "Night of the Living Dead", [63]

A more interesting question though is whether, if the editor of this edition had added a little additional text about, let us say, the publishing history of *Alice*, that additional text would have have been copyrightable and if it were copyrightable, whether the entire text of the edition would be subject to a "thin" copyright under the teaching of *Feist Publications, Inc.* v. *Rural Telephone Service Co.*[64] But perhaps additional text would not

[62]⇑ *See* Vanpelt, *Mickey Mouse—A Truly Public Character*, <URL: http://www.public.asu.edu/ dkarjala/publicdomain/Vanpelt-s99.html> (1999)

[63]⇑ *See* "Public Domain Programs and Feature Films" <URL: http://www.omegapic.com/pubdom.htm>, which I gather is a very popular work and a classic "horror" movie.

[64]⇑ 499 U.S. 340 (1991).

Feist is important for its recognition of the fact that copyright protection can be "thin" in the sense that it protects only limited aspects or small portions of a copyrighted work. The Supreme Court held there that the white pages of a telephone directory containing only facts arranged in an unoriginal fashion lacked the originality that is constitutionally required if a work is is to be entitled to copyright protection. It was therefore not an infringement of the plaintiff's copyright in the combined white and yellow pages for the defendant to publish a copy of the white pages.

Feist is so central to any interpretation of the Anti-Circumvention provisions that I feel justified in quoting it here at some length.

> This case concerns the interaction of two well-established propositions. The first is that facts are not copyrightable; the other, that compilations of facts generally are. Each of these propositions possesses an impeccable pedigree. That there can be no valid copyright in facts is universally understood. The most fundamental axiom of copyright law is that "no author may copyright his ideas or the facts he narrates." Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 556 (1985). . . . At the same time, however, it is beyond dispute that compilations of facts are within the subject matter of copyright. . . . There is an undeniable tension between these two propositions. Many compilations consist of nothing but raw data—*i. e.*, wholly factual information not accompanied by any original written expression. On what basis may one claim a copyright in such a work? Common sense tells us that 100 uncopyrightable facts do not magically change their status when gathered together in one place. Yet copyright law seems to contemplate that

> compilations that consist exclusively of facts are potentially within its scope.
>
> The key to resolving the tension lies in understanding why facts are not copyrightable. The *sine qua non* of copyright is originality. To qualify for copyright protection, a work must be original to the author. Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, "no matter how crude, humble or obvious" it might be. . . .
>
> Originality is a constitutional requirement. The source of Congress' power to enact copyright laws is Article I, 8, cl. 8, of the Constitution, which authorizes Congress to "secure for limited Times to Authors . . . the exclusive Right to their respective Writings." In two decisions from the late 19th century this Court defined the crucial terms "authors" and "writings." In so doing, the Court made it unmistakably clear that these terms presuppose a degree of originality.
>
> . . . .
>
> *This protection is subject to an important limitation. The mere fact that a work is copyrighted does not mean that every element of the work may be protected.* Originality remains the *sine qua non* of copyright; accordingly, copyright protection may extend only to those components of a work that are original to the author. Thus, if the compilation author clothes facts with an original collocation of words, he or she may be able to claim a copyright in this written expression. Others may copy the underlying facts from the publication, but not the precise words used to present them. In *Harper & Row*, for example, we explained that President Ford could not prevent others from copying bare historical facts from his autobiography, but that he could prevent others from copying his "subjective descriptions and portraits of public figures." Where the compilation author adds no written expression but rather lets the facts speak for themselves, the expressive element is more elusive. The only conceivable expression is the manner in which the compiler has selected and arranged the facts. Thus, if the selection and arrangement are original, these elements of the work are eligible for copyright protection. No matter how original the format, however, the facts themselves do not become original through association.
>
> *This inevitably means that the copyright in a factual compilation is thin.* Notwithstanding a valid copyright, a subsequent compiler remains free to use the facts contained in another's publication to aid in preparing a competing work, so long as the competing work does not feature the same selection and arrangement. As one commentator explains it: "No matter how much original authorship the work displays, the facts and ideas it exposes are free for the taking. . . . The very same facts and ideas may be divorced from the context imposed by the author, and restated or reshuffled by second comers, even if the author was the first to discover the facts or to propose the ideas." . . . .[65]

Feist speaks of "facts" as not being protected by copyright, but its conclusion applies

even be necessary, for a court might well hold that the additional textual material included in Figure 1 is enough to satisfy the originality requirement established in *Feist* as a prerequisite for any copyright protection. If that argument were to prevail, it would follow from the position taken by Judge Kaplan in *Reimerdes* that one could not circumvent the access controls contained in the GlassBook edition of *Alice* without violating 17 U.S.C. § 1201(a)(1), *even if one's purpose was solely to read the public domain text of Alice.*

That would not be objectionable were it to be applied only to the access controls that limit one's ability to obtain access to the work when one does not have a copy, but I find it impossible to believe that Congress intended to forbid one from reading or making a copy of the public domain portions of one's own copy of an e-book or to make other uses of that copy that do not amount to an infringement of the rights of the copyright owner. There are many uses that can be made of a book that do not amount to an infringement of the copyright owner's rights. Reading the book and making copies of the portions of the book that are not protected by copyright are two examples. Another example is making copies or distributing portions of a book that would be a violation of the copyright except for the court created doctrine of "fair use."[66]

4.2.3 Gaining Access to Do the Unpermitted

The most interesting issue raised by this edition of *Alice in Wonderland* is, of course, the legal status of the "permissions" that restrict the use that can

equally to works in the public domain, which, by definition, are also not protected by copyright.

[66] ⇑ *See infra* Section 5.4.

If the publisher of the GlassBook edition of *Alice* had placed a copyright notice on that edition, it might have been liable to criminal penalties pursuant to the provisions of 17 U.S.C. § 506(c), which provides that:

> FRAUDULENT COPYRIGHT NOTICE.—Any person who, with fraudulent intent, places on any article a notice of copyright or words of the same purport that such person knows to be false, or who, with fraudulent intent, publicly distributes or imports for public distribution any article bearing such notice or words that such person knows to be false, shall be fined not more than $2,500.

while any person who removed such a hypothetical copyright notice might have been liable to criminal penalties pursuant to the provisions of 17 U.S.C. § 506(d), which provides that:

> FRAUDULENT REMOVAL OF COPYRIGHT NOTICE.—Any person who, with fraudulent intent, removes or alters any notice of copyright appearing on a copy of a copyrighted work shall be fined not more than $2,500.

be made of it.[67]

Let us consider the purely hypothetical case of someone—let us call her "Jane"—who is blind and who has downloaded a copy of the GlassBook reader to her computer[68] and then used that program in turn to download a copy of the GlassBook edition of *Alice in Wonderland* to the hard-drive of her computer. Now Jane has software and hardware on her Windows computer that reads aloud the contents of files containing ASCII text,[69] but this software will not work with her copy of *Alice in Wonderland* because the text is scrambled and supposedly only decodeable by the GlassBook software. The GlassBook reader also has the ability to read aloud the text, but the GlassBook edition of *Alice in Wonderland* has its permissions set so that Jane cannot take advantage of this feature.

Thus Jane, who, being blind, cannot read the text of *Alice*, is also unable to listen to it since her access to the contents of her copy of the text is blocked by the GlassBook scrambling technology. This seems unfortunate, but it is unlikely that Jane has any legal right to have those access control measures removed.[70]

On the other hand, Jane has, in this hypothetical example, a twelve-year old niece, Amanda, who is a whiz with computers and who figures out how to circumvent the GlassBook access controls,[71] so that Jane is able to use her regular software to read the text aloud, despite the fact that the edition of *Alice* does not give her permission to do so.

Now, assuming that someone—Adobe or VolumeOne—does claim that they own the copyright to the text of the GlassBook edition of *Alice in Wonderland* because of the additional material that they added to the public domain text,[72] is it conceivable that any court would hold that Jane had violated the primary Anti-Circumvention provision—17 U.S.C. § 1201(a)(1)[73]—by unscrambling a scrambled work, decrypting an encrypted work, or otherwise avoiding, bypassing, removing, deactivating, or impairing a technological measure, without the authority of the copyright owner, that in the ordinary course of its operation, requires the application of information, or

[67]⇑ *See supra* Figure 1 and text accompanying Notes 50-56.

[68]⇑ Which uses the Microsoft Windows operating system that, unlike Linux, does support the GlassBook software.

[69]⇑ ASCII is the most common digital format used for encoding English texts. *See supra* Note 46.

[70]⇑ Would she perhaps have a cause of action under Americans with Disabilities Act? *See* <URL: http://www.usdoj.gov/crt/ada/adahom1.htm>.

[71]⇑ Exactly how this is done is beyond the scope of this hypothetical example.

[72]⇑ See supra text accompanying Note 64.

[73]⇑ See supra Note 19.

a process or treatment with the authority of the copyright owner, to gain access to the copyrighted work contained in the GlassBook edition of *Alice in Wonderland*?[74]

Since the reason for this circumvention was to allow Jane to hear the text of *Alice* read aloud, it seems probable that most people, and most courts, would consider this a clear example of "fair use;" but the doctrine of "fair use" is, according to Judge Kaplan and the plaintiffs in *Reimerdes*, not a defense to a charge of violating the circumvention provisions of the DMCA. [75] There is, however, no actual conflict between Judge Kaplan's position and that of those who believe that Jane's circumvention should be permitted; Judge Kaplan is right if, and only if, the Anti-Circumvention provisions apply to only to obtaining access to the work without the authority of the copyright owner and do not apply to obtaining access to a copy of the work like Jane's copy of the e-book or Jon Johansen's copies of his DVD's.

5 The Anti-Circumvention Provisions Do Not Apply to Copies of a Work

It is my thesis that the two Anti-Circumvention provisions do not apply when the circumvention is done to gain access to a copy of a work made with the authority of the copyright owner, whether that copy is a book—electronic or otherwise—, a computer program on a floppy disk, a phonorecord,[76] or a video DVD. Moreover, if one stops and thinks about it for a moment, that thesis, or so it seems to me, is almost self-evidently true, for who would dare argue that in passing the DMCA congress intended to make it illegal for the owner of a book, whether printed on paper or stored electronically, to read its contents?

[74]⇑ It seems unlikely that the answer to this question will differ depending upon whether Amanda's solution to the problem of letting her aunt hear the text of *Alice* involves descrambling (or decryption), on the one hand, or the avoiding, bypassing, removing, etc., of a technological measure, on the other. One should note, however, that, if Amanda's solution involves snarfing of the decrypted text while it is on its way to the monitor, then the decryption was done by the GlassBook reader software, which surely must do that decryption with the consent of the copyright owner, considering that the it was the copyright owner's decision to distribute the file using the GlassBook software. *See infra* Note 74 and accompanying text.

[75]⇑ *See infra* Section 5.4.

[76]⇑ According to the definition of "copies" given in 17 U.S.C. § 101 [*infra* Note 84], a phonorecord is not a copy; since, however, both copies and phonorecords are tangible media of expression in which a work is fixed, for our immediate purposes there is no reason to distinguish between phonorecords and other types of copies.

One cannot read a book if one is denied access to its contents.

Although it may not be quite so self-evident at first, it is also true that the Anti-Circumvention provisions do not distinguish between the various types of works that may be fixed in a copy or between the various types of copies in which a work may be fixed. If the Anti-Circumvention provisions do not apply to a tangible book that you own, then they do not apply to a tangible copy of a computer program that you own; if they do not apply to that copy of a computer program, then they do not apply to a tangible phonorecord—a CD, let us say—that you own; and if they do not apply to that CD, then they do not apply to a DVD that you own.[77]

On this view, the only real question raised in the *Reimerdes* case is whether the Anti-Circumvention provisions, and particularly 17 U.S.C. § 1201(a)(2), forbid the defendants in that case from distributing devices or technologies that enable you and others like you to gain access to the contents of your book, or your floppy disk containing a computer program, or your music CD, or your video DVD. I just claimed that it is self-evident that Congress did not intend that result when it enacted the Anti-Circumvention provisions.

The Motion Picture Industry, of course, is not willing to accept this self-evident thesis.

5.1 What the Motion Picture Industry Claims

If you buy a copy of mystery novel, you would not expect its author or its publisher to be able to make it a crime for you to read it. If you buy a recording of a song, you would not expect the person who owns the copyright to be able to make it a crime for you to listen to it. If you buy a recording of a movie, you would not expect the owner of the copyright to be able to make it a crime for you to view it.

On the other hand, that is exactly what the motion picture industry in the *Reimerdes* case, and many other so-called content providers, claim that they have been able to do since the prohibitions of 17 U.S.C. § 1201(a)(1) went into effect on October 28, 2000. All they have to do, according to their theory, is to scramble the contents of your book[78] or your recording

[77]⇑ in part the illusion that the publication of DeCSS is a violation 17 U.S.C. § 1201(a)(2) is undoubtedly a consequence of the fact that we are not as familiar with DVD's as we are with books. The Anti-Circumvention provisions, however, apply to books just as much as they do to DVD's.

[78]⇑ Since it is difficult to scramble the content of an ordinary book, it is easiest to assume for the purposes of this example that your copy of the mystery novel is a so-called "e-book" where the text is presented in digitized form and can be read only with the

with even the weakest sort of encryption program. If you then circumvent the scrambling, you are liable for civil penalties[79] and, if you do so "willfully and for purposes of commercial advantage or private financial gain," criminal penalties.[80] If you protest that since you purchased the copy or the recording, mediately or immediately, from the owner of the copyright, any circumvention that you did was with the authority of that owner, the content providers' answer is simple. It amounts to pointing out that if they had consented to the circumvention they would not be suing you.

Despite this ingenious argument, it is, once again, the thesis of this article that Congress, in passing the Anti-Circumvention provisions of the DMCA, did not provide copyright owners with the right to prevent you from gaining access to the contents of your own books or your own Digital Versatile Disks[81] and other digital media.

There are many arguments that support this thesis, but the two major ones are:

> (i) By their express terms the Anti-Circumvention provisions only apply to the intangible *works* that are protected by copyright and do not apply to the tangible *copies* of such works; and
>
> (ii) If a copyright owner has directly or indirectly sold a tangible copy—for example, a digital versatile disk—of the copyrighted work, then that copyright owner can hardly deny that the purchaser lacks the copyright owner's authority to access the contents of the disk.[82]

---

aid of a dedicated e-book browser or, more usefully, with the aid of a general purpose computer running a program like Adobe's "Acroread" program or the the open-source program "xpdf."

On the other hand consider the case of a diary containing a short printed quotation at the beginning of the blank pages reserved for each month and openable only if one has the key to the tiny padlock lock that "protects" it. The selection of the quotations is enough to cause the text of the diary to be protected by copyright, albeit a thin one, so, if you use a bobby pin to open the lock without the permission of the publisher of the diary, you will have violated § 1201(a)(1) and will be liable to civil and perhaps even criminal penalties, if, and only if, the motion picture companies interpretation is correct.

[79]⇑ *See* 17 U.S.C. 1203.

[80]⇑ *See* 17 U.S.C. 1203.

[81]⇑ Which may contain music, and text, and other data, as well as movies.

[82]⇑ If the seller can deny that you lack the necessary authority to legally view the contents of the DVD that the seller sold to you, then you are going to have a good cause of action for fraud and for breach of the implied warranty of title, now aren't you?

5.2 Accessing Works vs. Accessing Copies

The Copyright Act makes a fundamental distinction between the intangible "works" that are, if they are original and "fixed in any tangible medium of expression," protected by copyright[83] and the tangible copies (or phonorecords) in which the works are fixed.[84]

> "Copies" are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "copies" includes the material object, other than a phonorecord, in which the work is first fixed.[85]

This distinction between the intangible work and the tangible copy can, of course, be confusing.

> . . . Many in the emerging information industries simply view "copy" in a lay person's sense, and are mystified when told that it is defined as a "material object" for copyright purposes. There is an important difference between a copyrighted work, and a physical object in which the work may be fixed. . . .
>
> To illustrate the difference between the general notion of copy and "copy" for purposes of the copyright rights of reproduction

[83]⇑ 17 U.S.C. § 102(a) provides:

> (a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:
>
> (1) literary works;
> (2) musical works, including any accompanying words;
> (3) dramatic works, including any accompanying music;
> (4) pantomimes and choreographic works;
> (5) pictorial, graphic, and sculptural works;
> (6) motion pictures and other audiovisual works;
> (7) sound recordings; and
> (8) architectural works.

[84]⇑

> A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.

17 U.S.C. § 101.

[85]⇑ 17 U.S.C. § 101.

> and distribution, it is sometimes helpful to use imagery familiar to computer users. My favorite is the image of a "flying toaster" that used to dart across my PC screen while the computer was otherwise idle. With today's technology, there is no way to move a metal toaster over fiber optic cables or fly it to a satellite for transmission to users. There is also no way to send a piece of plastic, tape, paper, or similar physical object over the Internet. No "copy" of a copyrighted work is transmitted over the Internet. . .
>
> The misunderstanding may stem from the often interchangeable use of the concept of a copy in the sense of a "reproduction" of a work and copy as the physical object in which the reproduction may be fixed. Further elaboration on the difference between a reproduction and a copy may clarify the situation. . . . For example, [consider] the following illustration of the meaning of "copy:"
>
> > ". . . the outright sale of an authorized copy of a book frees it from any copyright control over its resale price or other conditions of its future disposition. A library that has acquired ownership of a copy is entitled to lend it under any conditions it chooses to impose. . . ."[86]

In short, the owner of a copy (or phonorecord) of a work has all the legal rights and privileges with respect to that copy that anyone can have with respect to a tangible chattel. This is not a matter of copyright law, but rather of the general law relating to goods and chattels.[87] The owner of a copyright in a work, on the other hand, has no rights whatsoever in or to the tangible copies in which the work may be fixed; the copyright owner has only the limited set of rights with respect to the intangible work itself that are conferred by § 106 of the Copyright Act.[88] Those rights of the copyright

[86]⇑ Comments of Patrice A Lyons submitted to the U.S. Copyright Office & National Telecommunications and Information Administration with respect to *Report to Congress Pursuant to Section 104 of the Digital Millennium Copyright Act* [Docket No. 000522150-0150-01], /href http://hdl.handle.net/4263537/section109 <URL: http://hdl.handle.net/4263537/section109>, pp. 1-3, *quoting* H.R. REP. NO. 1476, 94TH CONG., 2D SESS. (1976) at 79. [footnotes omitted.]

[87]⇑ *See* R.A. BROWN, PERSONAL PROPERTY (3d ed., 1975) *passim.*

[88]⇑

> Subject to sections 107 through 121, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

owner do not include the right to keep the owner of a copy of the work from getting access to its contents.

Although 17 U.S.C. § 1201(a)(1) does seem to give the owner of a copyright the additional right to keep those who do not already have authorized access to a *work*[89] from getting access to it by descrambling even a trivial encryption system[90] it does not purport to take away from the owner of a *copy* of a work the right to access the contents of that copy.

This careful distinction between works and copies is exactly what one would expect, for it is difficult to believe that Congress intended in enacting the Anti-Circumvention provisions of the DMCA to forbid the owner of a book, even if that book is a new fangled electronic book, from getting access to its contents in order to read them, or make other non-infringing use of them. It seems equally inconceivable that Congress intended to forbid the owner of a video DVD from viewing its contents without obtaining additional permission of the person who already sold him the DVD.[91]

Thus neither the express language of the Anti-Circumvention provisions, which carefully refer to access to a work, not access to a copy, nor the pre-

> (1) to reproduce the copyrighted work in copies or phonorecords;
> (2) to prepare derivative works based upon the copyrighted work;
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
> (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
> (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. § 106.

[89]⇑ This would include cases where a scrambled work is being broadcast and no one has copies of it in tangible form and cases where a scrambled work is available on the Internet for downloading subject to certain conditions and the circumventor neither has a copy nor the ability to satisfy the conditions. See the example *supra* in Section 4.2.1. The exact extent of such cases is an issue beyond the scope of this article.

This right conferred by 17 U.S.C. § Section1201(a)(1) is, however, not one of the exclusive rights granted by the Copyright Act to an owner of a copyright.

[90]⇑ See *supra* Note 19 for the definition in 17 U.S.C. § 1201(a)(3)(B) that makes clear that the requirement that the circumvented technological measure that effectively controls access to a work does not have to be very effective.

[91]⇑ That congress did not intend to limit the right of a purchaser of a copy to access the contents of that copy is confirmed by the legislative history. *See infra* Section 5.4.

sumed intent of Congress in enacting those provisions, supports the contention that it is a violation of the Anti-Circumvention provisions to circumvent a technological measure that prevents one from obtaining access to the contents of a tangible copy of a work, especially when the copy was sold to its owner with the authority of owner of the copyright.

The strongest argument against this construction of the express language of the Anti-Circumvention provisions is that no one seems to have raised it up to now. This is hardly a telling argument, however, since of the two cases that I know of that have been brought to enforce the Anti-Circumvention provisions, one, *Realnetworks, Inc.* v. *Streambox, Inc.*[92] involved audio and visual information that was "streamed" over the Internet so that the alleged underlying circumvention did not consist of gaining access to a tangible copy of the work, while both cases, the other being *Reimerdes*, involved actions against defendants charged with distributing circumvention software, not with actually doing the circumvention themselves.

Admittedly this argument, based as it is on the statutory distinction between the terms "work" and "copy," will strike most people as dry and technical. But then statutory interpretation is a dry and technical enterprise. If one asks why Congress would have intended to make such a distinction, on the other hand, the answer need not be so technical. The distinction was made to keep it from being a crime for me to read my book, or you to listen to your Compact Disk, or Jon Johansen to view his video DVD's.

5.3 The Owner of a Copy Has Authority to Access It

Now if that still is not persuasive, here is a less technical argument.

Even if one reads the Anti-Circumvention provisions as applying not only to obtaining initial access to a copyrighted work, but also to obtaining access to one's own copy of it, they still only forbid obtaining such access "without authority of the owner of the copyright."

Now how can a vendor who sells you a book, or any other tangible copy of a copyrighted work, claim that you are not authorized to access it for the

[92] ⇑ 2000 U.S. Dist. LEXIS 1889, No. C99-2070P, 2000 WL 127311, *9 (W.D. Wash. Jan. 18, 2000).

This case was settled without any further opinion.

For our purposes, the only interesting feature of *Realnetworks* is that it established a very low threshold for the effectiveness that is required for a technological measure to be effective for the purposes of the Anti-Circumvention provisions. In *Realnetworks* the technological control measure was called the "Copy Switch" and apparently consisted of a single byte—or, perhaps, a single bit, which when it was set prevented further copying.

purpose of reading it, or for any other reason,[93] without that vendor being liable for fraud, or at least for breach of the implied warranty of title that applies to any sale of tangible goods?[94]

One does not need to cite authority[95] for the proposition that if one buys a book the seller cannot deny that the buyer has authority to access its contents in order to read them and to do all the other things that one lawfully can do with a text. Nor can the seller of a phonograph record or a music CD deny that the buyer has authority to listen to it. And that proposition remains true if it is applied *mutatis mutandis* to running computer programs or to viewing video DVD's.[96]

5.3.1 First Sale

There is, moreover, a well established doctrine that applies to both copyright and patent law, which is only partially captured by the provisions of § 109 of the Copyright Act, known as the "first sale" doctrine, that provides that after the first sale of a copyrighted or patented article the owner of the article can do anything with it that he wants that is not otherwise forbidden by law. 17 U.S.C. § 109(a) in particular provides that "Notwithstanding the provisions of section 106(3),[97] the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord."

I suppose that in theory one could argue that in expressly applying the

[93]⇑ Including even making a copy.

Although some copying will constitute an infringement of the copyright owner's rights, other types of copying are clearly permitted as "fair use."

[94]⇑ U.C.C. § 2-312.

Would I be liable for champerty or maintenance were I to suggest that every owner of a computer running the Linux operating system who has purchased a video DVD should sue the store that sold the DVD in the local small claims court for fraud and violation of warranty of title for failing to disclose that the sale of the DVD did not include the authority to view it on the buyer's computer? A few cases like that might well cause the members of the MPAA to withdraw their complaint in the *Reimerdes* case and thus vindicate the arguments that I make in this article.

(At times I almost regret that the study of the law is not an experimental science.)

[95]⇑ And the point is so self-evident that one is not likely to find any discussion that one could cite.

[96]⇑ Whether the result would be the same if the seller were to purport to "license" the tangible copy to the "purchaser"—who in that case would be a mere licensee—rather than selling it, is a matter beyond the scope of this article.

[97]⇑ Section 106(3) is the provision giving the owner of a copyright the exclusive right to distribute the work. *See supra* Note 88.

first sale doctrine to cases where the owner of a copy seeks to resell it, the draftsmen of the Copyright Act implicitly provided that that doctrine does not apply in other cases; but I trust that one would be laughed out of court if one really tried to use that argument, especially since section 106(3) of the Copyright Act gives the owner of the copyright the exclusive right "to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending," which might arguably, were it not for the provisions of section 109, be construed as applying to resales and other "dispositions", but cannot apply to other types of uses—like viewing the contents of a video DVD to which the Anti-Circumvention provisions arguably apply[98]

No one would expect the Copyright Act to provide expressly that one can use a book as a door-stop or a DVD as a coaster without the authority of the copyright owner—or that one can read the book or view the DVD without the authority of the copyright owner. One does not need the authority of the copyright owner to perform those acts.

If, however, contrary to the arguments that I have made in the previous section, one construes the Anti-Circumvention provisions as applying to copies of works rather than to the works themselves, then, since October 28, 2000, it has been illegal for you or anyone else, at least within the United States, to read a book or view a video DVD if it has been scrambled or otherwise "protected" by some technological measure, without first obtaining the authority of the owner of the copyright. In particular, it would mean that one cannot legally view a video DVD that has been scrambled with the Content Scrambling System[99] on any—I repeat *any*—dedicated viewer or general purpose computer without first obtaining the authority of the copyright owner, because the viewer, or computer, has to circumvent—*i.e.*, unscramble—the technological measure—*i.e.*, the CSS scrambling—that prevents access to the contents of the DVD. *Mutatis mutandis* you also need to have obtained the authority of the copyright owner before you read a scrambled book, run a scrambled computer program, or listen to a scrambled phonorecord; otherwise you will have violated 17 U.S.C. § 1201(a)(1), you criminal hacker, you.

The simple fact is that one can only view the contents of a DVD that has been scrambled with the Content Scrambling System, or read an electronic book that has been scrambled with some other system, by first unscrambling it—that is, by circumventing the system. If one accepts the conclusion that

[98]⇑ At least in the view of the Motion Picture Association of America.
[99]⇑ *See supra* Note 22 and accompanying text.

the Anti-Circumvention provisions simply do not apply to cases where one circumvents a technological measure in order to gain access to a copy of the work, then in such cases one does not need the authority of copyright owner, just as one does not need the authority of the copyright owner to resell the copy of the work.[100] On the other hand, if one does not accept the conclusion that the Anti-Circumvention Provisions do not apply to a copy of a work, then one can only conclude that the owner of the copyright must have have given the purchaser of the copy—the DVD or e-book—the authority need to legally access it at the time of the purchase, otherwise the sale would have been void for failure of consideration.[101]

It surely is not the case that everyone, who since October 28, 2000, while within the United States, has read a scrambled book or viewed a scrambled video DVD that they have purchased, has violated 17 U.S.C. § 1201(a)(1). Yet, since one cannot read a scrambled book or view a scrambled video DVD without circumventing the scrambling system, all those persons would have violated 17 U.S.C. § 1201(a)(1) did they not have the authority of the copyright owner to engage in such circumvention. Therefore everyone who has purchased a scrambled book or video DVD—or other scrambled copy of a work—must have acquired the authority of the copyright owner to circumvent the scrambling or other technological measure.[102]

In the *Reimerdes* case it was apparently the plaintiff's position that they had authorized purchasers of DVD's to use some means of circumvention—such as the software for Microsoft Windows that allows one to view a DVD, but not others like DeCSS. There is, however, no evidence that any purchaser of a video DVD was ever informed that their authority to view DVD's is limited. As the defendants in *Reimerdes* point out in their reply brief on th appeal of that case to the Federal Court of Appeals for the Second Circuit:

> The Studios argue that a purchaser of a DVD containing their movies does not receive legal "authority" to decrypt the work. Instead, they claim that "authorization by the Studios [upon purchase of a DVD] has been limited to accessing DVD content via authorized equipment." But where and how has this authority "limited"? Nowhere during or after the purchase transaction are consumers informed, much less contractually bound, to view the work only on "authorized equipment." To the contrary,

[100]⇑ *See supra* text accompanying Note 97.

[101]⇑ No one would be willing to pay good and valuable consideration for a video DVD whose contents they could not view or for an e-book that they could not read.

[102]⇑ Unless that authority is not required because the the Anti-Circumvention provisions do not apply to a tangible copy—such as a DVD—of a work. *See supra* Section 5.2.

> DVDs are sold with no contractual restrictions whatsoever.
>
> Both law and common sense provide that, in absence of some sort of contractual limitation, one obtains the necessary legal "authority" to access and view the film contained therein by purchasing or otherwise legally acquiring a DVD. Nothing in the legislative history of §1201 or the plain language of the statute provides that Congress intended the access provision to allow copyright holders to require that consumers play DVDs on a studio-approved player. . . .[103]

5.3.2 Abuse of Copyright

There is another doctrine, although it is admittedly not so well established as the first sale doctrine, that holds that an effort by the owner of a patent or a copyright to extend the legally granted monopoly to other uses or products, invalidates the patent or the copyright.[104] Considering how spurious their claims are that the use of DeCSS to descramble the DVD's that they have produced and sold violates their rights under the Anti-Circumvention provisions because they, as the copyright owners, have not authorized the descrambling, the plaintiffs in the *Reimerdes* case might be well advised to pause and at least consider whether they really want to run the risk of having those copyrights nullified.

5.4 Fair Use and Legislative Intent

Since this entire article is concerned with the interpretation of the Anti-Circumvention provisions there are those who may feel that that issue is best decided by examining their legislative history.

Judge Kaplan was apparently of that view, for, in dismissing the defendants' argument that the Anti-Circumvention provisions effectively deny the public the constitutional right to make fair use[105] of copies of works, like

[103]⇑ EFF/2600 Appellate Reply Brief in MPAA v. 2600 Case, <URL: http://www.eff.org/IP/Video/MPAA_DVD_cases/20010319_ny_eff_appeal_reply_brief.html<, (Mar. 19, 2001) [Citations omitted; footnotes omitted].

[104]⇑ *See, e.g.*, Morton Salt Co. v. G.S. Suppiger, 314 U.S. 488, 494 (1942) (patent); Lasercomb America., Inc. v. Reynolds, 911 F.2d 970 (4th Cir. 1990); Frischmann and Moylan, *The Evolving Common Law Doctrine of Copyright Misuse: A Unified Theory and Its Application to Software*, 15 Berkeley Tech. L.J. 865 (2000).

[105]⇑

> Finally, defendants rely on the doctrine of fair use. Stated in its most general terms, the doctrine, now codified in Section 107 of the Copyright Act, limits

DVD's, that are protected by access controls, he said:

> The use of technological means of controlling access to a copyrighted work may affect the ability to make fair uses of the work. Focusing specifically on the facts of this case, the application of CSS to encrypt a copyrighted motion picture requires the use of a compliant DVD player to view or listen to the movie. Perhaps more significantly, it prevents exact copying of either the video or the audio portion of all or any part of the film. This latter point means that certain uses that might qualify as "fair" for purposes of copyright infringement—for example, the preparation by a film studies professor of a single CD-ROM or tape containing two scenes from different movies in order to illustrate a point in a lecture on cinematography, as opposed to showing relevant parts of two different DVDs—would be difficult or impossible absent circumvention of the CSS encryption. Defendants therefore argue that the DMCA cannot properly be construed to make it difficult or impossible to make any fair use of plaintiffs' copyrighted works and that the statute therefore does not reach their activities, which are simply a means to enable users of DeCSS to make such fair uses.
>
> Defendants have focused on a significant point. Access control measures such as CSS do involve some risk of preventing lawful as well as unlawful uses of copyrighted material. Congress, however, clearly faced up to and dealt with this question in enacting the DMCA. The Court begins its statutory analysis, as it must, with the language of the statute. Section 107 of the Copyright Act provides in critical part that certain uses of copyrighted works that otherwise would be wrongful are "not . . . infringement[s] of copyright." Defendants, however, are not here sued for copyright infringement. They are sued for offering and providing technology designed to circumvent technological measures

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> the exclusive rights of a copyright holder by permitting others to make limited use of portions of the copyrighted work, for appropriate purposes, free of liability for copyright infringement. For example, it is permissible for one other than the copyright owner to reprint or quote a suitable part of a copyrighted book or article in certain circumstances. The doctrine traditionally has facilitated literary and artistic criticism, teaching and scholarship, and other socially useful forms of expression. It has been viewed by courts as a safety valve that accommodates the exclusive rights conferred by copyright with the freedom of expression guaranteed by the First Amendment.

111 F. Supp. 2d 294, 321-22.

> that control access to copyrighted works and otherwise violating Section 1201(a)(2) of the Act. If Congress had meant the fair use defense to apply to such actions, it would have said so. Indeed, as the legislative history demonstrates, the decision not to make fair use a defense to a claim under Section 1201(a) was quite deliberate.
>
> Congress was well aware during the consideration of the DMCA of the traditional role of the fair use defense in accommodating the exclusive rights of copyright owners with the legitimate interests of noninfringing users of portions of copyrighted works. It recognized the contention, voiced by a range of constituencies concerned with the legislation, that technological controls on access to copyrighted works might erode fair use by preventing access even for uses that would be deemed "fair" if only access might be gained. And it struck a balance among the competing interests.
>
> The first element of the balance was the careful limitation of Section 1201(a)(1)'s prohibition of the act of circumvention to the act itself so as not to "apply to subsequent actions of a person once he or she has obtained authorized access to a copy of a [copyrighted] work. . . ." By doing so, it left "the traditional defenses to copyright infringement, including fair use, . . . fully applicable" provided "the access is authorized."[106]

Let me repeat that: "Section 1201(a)(1)'s prohibition of the act of circumvention [was limited] to the act itself *so as not to 'apply to subsequent actions of a person once he or she has obtained authorized access to a copy of a [copyrighted] work. . . .'*"

That is, surely, exactly what I have been arguing all along.

The intent of Congress expressed in the legislative history is clear: If one has authorized access to a copy of a work—for example, if one has purchased, mediately or immediately, a video DVD from one of the plaintiffs—then it is not a violation of § 1201(a)(1) for one subsequently to circumvent a technological measure—like CSS—that keeps one from getting access to the contents of the copy. It would circumvent this intent to hold, as Judge Kaplan apparently did, that the owner of the copyright can effectively revoke the authorization at any time, for in that case there would be no balancing of the various interests and no protection for fair use whatsoever, since,

[106] ⇑ 111 F. Supp. 2d 294, 322-23.
See also the legislative history quoted *supra* in Note 15.

by withholding their "consent" whenever they felt like it[107] the owner of copyright could always make it a violation of 17 U.S.C. § 1201(a)(1) for an owner of a copy to circumvent a technological measure in order to make fair use, or any other non-infringing use, of the contents of that copy.

5.5 Non-Infringing Uses

The concept of "fair use" is generally applied to uses that, if they were not "fair," would amount to a an infringement of the copyright in a work. Besides fair uses, there are many other uses of copyrighted works that do not constitute an infringement of the copyright: for example, reading an electronic book or viewing a video DVD. Another example is reading, or viewing, or even copying, material that is in the public domain.[108]

If the § 1201(a)(2) is interpreted as forbidding obtaining access to one's own copy of a work, be it a book or a video DVD, then it would forbid such access even for the purpose of making such non-infringing uses. Just as was the case with fair uses, the Anti-Circumvention provisions contain no exception for gaining access for the purpose of making a non-infringing use. The very absence of such an exemption, coupled with the express legislative intent discussed above,[109] is compelling evidence that that section does not apply to tangible copies of a work like DVD's.

5.6 The Publication of DeCSS Was Not a Violation of 17 U.S.C. § 1201(a)(2)

The arguments that I have made up to now for the most part address the issue of whether it is a violation of 17 U.S.C. § 1201(a)(1) to circumvent a technological measure that prevents one from getting access to a tangible copy of a work, like a video DVD, an issue that is not directly at issue in the *Reimerdes* litigation.

The issue in *Reimerdes* is—or at least should be—whether it is a violation of 17 U.S.C. § 1201(a)(2) to publish a computer program that is intended to be used or will primarily be used to circumvent a technological measure that prevents one from getting access to a tangible copy of a work.

The conclusion that it is not a violation of § 1201(a)(1) to use a technology or a device, like the DeCSS program, to circumvent technological

[107]⇑ Without even having to inform anyone that the consent is being withheld and the former authority being withdrawn.
[108]⇑ *See supra* Section 4.2.2.
[109]⇑ *See supra* Section 5.4.

measures, like the Content Scrambling System, that make it difficult to access a tangible copy of a work, like a DVD, entails, however, the conclusion it is not a violation of § 1201(a)(2), to distribute that technology or device. Thus if the arguments I have made with respect to § 1201(a)(1) are correct, it was not a violation of § 1201(a)(2) for the defendants in *Reimerdes* to publish the DeCSS program on their Web sites.

6 Constitutional Considerations

Although I am arguing here that *Reimerdes* need not be decided on constitutional grounds, but rather should be decided on the ground that the complaint there did not state a claim for which relief can be granted, that does not mean that the constitutional issues have no bearing on the proper interpretation of the Anti-Circumvention provisions.

In fact, if the arguments made up to now that the idea that *Reimerdes* necessarily raises constitutional issues is based on an illusion do not seem to be totally persuasive, then the fact that my interpretation avoids the necessity of deciding those issues becomes itself the ultimate argument in support of that interpretation.

> [W]e must remember that, "*when the validity of an act of the Congress is drawn in question, and . . . a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.*" *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932). Accord, *e. g.*, *Haynes* v. *United States*, 390 U.S. 85, 92 (1968) (dictum); *Schneider* v. *Smith*, 390 U.S. 17, 27 (1968); *United States* v. *Rumely*, 345 U.S. 41, 45 (1953); *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring).[110]

There are two quite distinct First Amendment arguments that would have to be considered if the courts were to conclude that publishing the DeCSS program does constitute a violation of 17 U.S.C. § 1201(a)(2).

[110] ⇑ United States v. Thirty-Seven Photographs, 402 U.S. 363, 370 (1971) [emphasis added] (*holding* that federal statute must be construed so as to avoid having to decide First Amendment issue.

6.1 Whether 17 U.S.C. § 1201(a)(2) Forbids the Publication of a Computer Program Raises a Serious First-Amendment Question

The first of these First Amendment arguments, and perhaps the most important in the greater scheme of things, is that, if § 1201(a)(2) is interpreted as forbidding the publication of computer programs, then that the First-Amendment rights of the defendants in the *Reimerdes* case will be unconstitutionally impaired. The defendants in the *Reimerdes* case clearly have standing to raise this issue, but it will raise difficult problems of constitutional interpretation that are perhaps not yet ripe for decision, particularly the issue of whether "strict scrutiny" or "intermediate scrutiny" should be applied.[111]

This issue could be avoided by holding that § 1201(a)(2) does not apply to computer programs, but such a result would be hard to reconcile with the fact that that section does expressly apply to "technology," a term that would seem to include "computer programs" and "software."

It could also be avoided in the *Reimerdes* case itself by holding that § 1201(a)(2) does not apply to DVD's because under the proper interpretation of § 1201(a)(1), that section does not apply to DVD's for all the reasons that I have given.[112]

6.2 Whether 17 U.S.C. § 1201(a) Forbids Fair Use of Copyrighted Works Raises a Serious First-Amendment Question

The other First Amendment issue is more integral to the interpretation of § 1201(a)(1). It is whether an interpretation of that section that forbids the making of fair use and non-infringing uses of one's own copy of a work in the form of a DVD or other tangible medium of expression violates the First Amendment, under the teaching of *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*.[113]

[111]⇑ *See* 111 F. Supp. 2d 294, 226-28.

[112]⇑ This construction would not avoid the same constitutional issue in a case like Realnetworks, Inc. v. Streambox, Inc., *supra* Note 92.

[113]⇑ 471 U.S. 539 (1985).

Harper & Row establishes the broad principle that the application of the copyright regulations would in many cases violate the First Amendment were it not for the doctrine of "fair use" and the "idea/expression" and "idea/fact" dichotomies, and all the other doctrines that keep the copyright regulations from being an effective means for suppressing the dissemination of information or ideas.

If one interprets § 1201(a)(1), in the way I contend one should, as not applying to tangible copies of a work like DVD's, then this issue is avoided as a constitutional issue, while at the same time the constitutional importance of "fair use" and similar doctrines supplies perhaps the strongest reason for not interpreting that section as applying to such copies.

7 Conclusion

And so the illusion that the *Reimerdes* case, in which the motion picture industry seeks to enjoin the publication of the text of the DeCSS computer program as a violation of the Anti-Circumvention provisions of the DMCA, can only be decided on First Amendment grounds vanishes—perhaps somewhat paradoxically.

- It is a cardinal principle that the federal courts must construe a statute to avoid, where possible, serious constitutional questions like those First Amendment issues that have received almost all the attention in the *Reimerdes* case.
- The legislative history of Anti-Circumvention provisions—the very legislative history that was relied on by the trial court in rejecting the defendants' fair-use defense—makes clear that Congress did not intend those provisions to apply to tangible copies of a work, like DVD video Disks, that have been acquired with the authority of the copyright owner.
- The Anti-Circumvention provisions by their express terms only apply to acts of circumvention where the circumventor gains access to the intangible *work* without the authority of the copyright owner; they do not apply acts of circumvention done to gain access to a tangible *copy* of a work, such as a video DVD.
- If someone has purchased a copy of a work, such as a video DVD, directly or indirectly from the owner of the copyright, then he has the authority of that owner to gain access to the contents of that copy.
- Thus it is not a violation of the Anti-Circumvention provisions to use the DeCSS program to gain access to a Video DVD that one has purchased directly or indirectly from the copyright owner.

- It is not a violation of the DMCA to manufacture or traffic in a technology or device, like the DeCSS program, that is intended or primarily used to gain access to a copy of a work with the authority of a copyright owner.

From that rather dull series of propositions the conclusion inexorably follows that the publication of the DeCSS program by the defendants in the *Reimerdes* case was not a violation of the Anti-Circumvention provisions, and, in particular, that it was not a violation of 17 U.S.C. § 1201(a)(2) and that the complaint in *Reimerdes* should consequently be dismissed for failure to state a claim for which relief can be granted.

And so the illusion that *Reimerdes* is an interesting case raising important First Amendment issues vanishes, as does any illusion that this is an interesting article.

But perhaps there is still an interesting issue here: Do all of us who have purchased video DVD's from the plaintiffs in *Reimerdes* have a good cause of action against them for slander of title?